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In the Supreme Court of the United States

October Term, 1975
No. 75-1219

JAMES F. SEXTON,
Petitioner,

vs.

DAVID M. KENNEDY, Secretary of the Treasury, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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JAMES F. SEXTON,
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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on October 30, 1975.

OPINIONS BELOW

The Sixth Circuit's opinion, reported at 523 F.2d 1311, appears at page A12 of the Appendix. The opinion of the District Court is unreported and appears at page A4 of the Appendix. The order denying petition for rehearing also appears in the Appendix at page A23.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 2, 1975. A timely petition for rehearing was denied on October 30, 1975. This Supreme Court granted extension of time to February 28, 1976, for filing this petition for certiorari, which is filed within that time. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether in an employee dismissal case a federal agency can circumvent the adverse action procedural protections of the Veterans Preference Act and infringe upon the employee's First Amendment rights through the subterfuge of an arbitrary transfer to avoid a specific statement of charges, thereby creating a charge for the purpose of separating the employee from the federal civil service?

2. Whether a District Court is limited in a federal employee separation case to a review of only whether applicable procedures were followed and whether the action taken was arbitrary and capricious; or whether the District Court's review may also include a determination as to whether substantial evidence supports the administrative findings?

3. Whether the United States deprived petitioner of other procedural and substantive safeguards secured to him by the Fifth Amendment and federal statute:

a. In removing him from the payroll without a prior thirty (30) day notice;

b. In denying him all right to witnesses (contrary to procedure) in a prior grievance;

c. In denying him reinstatement as ordered and thereby denying him the benefits accruing therefrom;

d. In taking a reprisal by way of transfer against the employee because he criticized the improper handling of tax cases and exercised legitimate First Amendment rights;

e. In removing important documents, forty-six (46) in number, from the administrative record of proceedings; and

f. By designating the personnel officer participating in the making of prior adverse decisions as the official to hear the oral reply?

4. Whether the District Court erred by granting the Government's motion for summary judgment where material and substantial issues of fact must be resolved in petitioner's favor for purposes of the motion for summary judgment?

CONSTITUTION AND STATUTES INVOLVED

The Constitutional provisions involved are the First and Fifth Amendments. The statutes involved are Title 5, Sections 7511, 7512, 7701, and Title 5, Section 706, of the United States Code. The Constitutional provisions and statutes are set forth in the Appendix.

STATEMENT OF THE CASE

Introduction

This case involves the discharge of an IRS agent from the federal service because of his refusal to accept a punitive transfer motivated by his superior's retaliation for his exercising First Amendment rights, both in his official capacity and that of a private citizen. Petitioner's transfer was a subterfuge. Rather than accuse petitioner of any wrongdoing, the IRS transferred petitioner to another city in order to use the transfer as a basis for discharge.

The Sixth Circuit, 523 F.2d 1311, at page 1312, concedes the facts when it states:

> "Sexton had been an IRS agent for some ten years before his 'continuing commentary' about the quality of his supervision resulted in his transfer * * * from the Cleveland IRS office to that in Dayton (Ohio) * * *."

This criticism, by the Sixth Circuit's interpretation, again at page 1312, constituted "incompatibility" and therefore was ground for punitive transfer.

The agency never was able to formulate any charges against petitioner for what he said. Instead, the agency transferred petitioner for the sole purpose of using his refusal to accept the new post of duty as a ground for discharge.

Petitioner's Uncontroverted Allegations

The Government filed no answer to petitioner's complaint, an action in mandamus, charging that his dismissal

from the federal service resulted from an illegal, arbitrary and capricious transfer (Complaint, Par. 2; R. 7).[1]

Petitioner's IRS career started August 9, 1954. Over the years, he examined income tax returns, corporate and individual. In 1958 and 1959, he served in taxpayer assistance programs, including appearances on radio and television as well as supervising selection of agents and preparation of material in schools for the public. In 1961 and 1962, he served in the Overseas Taxpayer Assistance programs, travelling to Germany, Italy, Lebanon, Saudi Arabia, Pakistan, India, Iran, Iraq, Turkey, Austria, Spain and Portugal. On these tours—from January to April—he taught military details and then travelled to various consulates and embassies in assisting military and civilian personnel living overseas (Complaint, Par. 3; R. 7).

In his examination of income tax returns, petitioner's case assignments saw substantial resolutions (Complaint, Par. 4; R. 9).[2]

On May 19, 1964, petitioner criticized in a tax case report the way that case and several other cases in his inventory previously had been handled. The truth of the criticisms were not subject to challenge (Complaint, Par. 5; R. 9).

On March 7, 1965, petitioner in a letter to the Regional Commissioner of the Central Region placed responsibility squarely on the Central Region and the Regional Commissioner. The validity and factual basis of petitioner's statements were never made the basis of any charge

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1. These references are to the paragraphs of the complaint and to pages of the Appendix filed in the Court of Appeals.

2. He closed one of the first international cases in the Cleveland District. It was resolved for $950,000, to which the taxpayer agreed. Another of petitioner's cases was resolved for $600,000.00 on reopening letters. A third case was a bank examination in which the taxpayer agreed to deficiencies of $1,076,189.00 (Complaint, Par. 4; R. 9).

of misconduct. Instead, the Regional Commissioner resorted to a transfer designed to separate petitioner from the government service (Complaint, Par. 6; R. 10). Ironically, while this was being done, one of the cases involved in the criticism ended up with ultimate deficiencies of $1,076,189.00 after the National Office, as a result of petitioner's insistence, reversed itself as to a position twice taken by it on the case (Complaint, Par. 7; R. 10).

The Regional Commissioner advised petitioner of the transfer by letter of July 20, 1965. He gave petitioner's criticisms as the reasons for the transfer, quoting from the May 19, 1964, and March 7, 1965, documents (Complaint, Par. 8; R. 11, 20). A subsequent grievance hearing, at which petitioner was denied witnesses, to which he was entitled, delayed the transfer date (Complaint, Par. 10; R. 12).

On the transfer date, August 28, 1966, petitioner did not report for duty in Dayton, Ohio, and was removed from the payroll without the 30 day notice required by law, an action subsequently confirmed by personnel action dated November 4, 1966, retroactively effective to August 28, 1966, for declination of a new post of duty (Complaint, Par. 11, R. 13; Par. 14, R. 15). That decision was reversed and petitioner was ordered retroactively restored to the employment rolls (Complaint, Par. 11; R. 13). But this was never done. The restoration was retroactive to November 4, 1966, thus erroneously effecting a merit determination for the period from August 28, 1966—the date of transfer—to November 4, 1966—the date of actual separation. Petitioner was next and finally separated on December 29, 1967, again with the procedural defect respecting the 30 day notice required by statute (Complaint, Par. 12, R. 13; Par. 14, R. 15).

Petitioner's complaint alleged that because the transfer was a subterfuge intended to deny him rights guaranteed by the Veterans Preference Act, the transfer became an adverse action. A statement of charges to administer the punishment, as required under the statute, became a requisite to the transfer. This never was done because the reasons for petitioner's transfer were his criticisms. Any statement of charges would have fallen apart because of the validity of the criticisms. The Regional Commissioner therefore resorted to a transfer deliberately designed to separate petitioner from the government service (Complaint, Par. 6, R. 10; Par. 9, R. 11).

Other allegations of the Complaint challenged various procedures and activities of the agency. Petitioner particularly objected to his oral reply in the second and last personnel action being heard by the personnel officer who had made prior adverse recommendations, thus denying petitioner an impartial consideration and hearing of the second oral reply (Complaint, Par. 13; R. 14). During the period of his reinstatement, petitioner was entitled to annual leave, sick leave and official time to prepare his oral and written replies, all of which were denied. He was removed from the payroll without the requisite thirty (30) day notice required by statute. He was denied his back pay (Complaint, Par. 14; R. 15).

The Complaint stressed that petitioner's March 7, 1965, letter to the Regional Commissioner of the Central Region was a petition for redress of grievance within the meaning of the First Amendment to the Constitution of the United States. His criticisms in that letter specifically were assigned as reasons for his transfer to Dayton, Ohio. Petitioner contended that this was arbitrary, capricious and a violation of petitioner's First Amendment rights and of his right to free speech (Complaint, Par. 15; R. 16).

The Administrative Record

The only testimony in the administrative record was that of the petitioner and of witnesses called by the petitioner (Tr. pp. 61-155).[3] The agency called no witnesses. It merely introduced the transfer as its evidence, apparently resting on a presumption of regularity. The burden of proof thus was placed upon the petitioner; and this is contrary to ordinary procedures in personnel actions of dismissal. The petitioner's testimony substantiated the allegations of the Complaint. The testimony of the other witnesses corroborated petitioner's testimony, thus bringing the questions of subterfuge, pretext and intent of the transferring official into issue. It was uncontroverted evidence and raised serious factual issues favorable in their import to petitioner.[4]

Before filing this administrative record, the Government first filed a motion to dismiss, which the District Judge treated as a motion for summary judgment to "determine if there is a genuine issue as to any material fact". The District Judge first decided on May 30, 1972 (App. p. A1), against the Government, thus holding on the allegations of the Complaint that there was a genuine issue of fact. On July 3, 1974, the District Judge then sustained the Government's motion for summary judgment, on an administrative record in which the sworn testimony substantiated the allegations of petitioner's Complaint.

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3. This is a reference to the administrative record.

4. The removal of 46 documents from the administrative record should here be noted. Petitioner's May 19, 1964, report and March 7, 1965, letter were missing. The Regional Commissioner's July 20, 1965, letter to petitioner was the documentary evidence of the reasons for the transfer. It too was missing. Also missing were letters bearing initials of those reviewing and approving decisions. The initials were blocked out. Documents attached to the written reply were missing. Removed, for example, was a copy of the December, 1964, issue of *Taxes—The Tax Magazine* (a CCH publication), at page 186, which discusses one of the very cases involved in petitioner's criticisms. The entire content of the documents removed was important.

REASONS FOR GRANTING THE WRIT

I. The Discharge of a Government Employee for Protected First Amendment Speech Is Adverse Action, Regardless of the Formal Charge of Refusing to Accept a Transfer. The Fourth, Fifth, Sixth and Seventh Circuits, Entirely Apart From Any First Amendment Considerations, Are in Conflict as to Whether an Employee Transfer, Under Circumstances Here Present, Is an "Adverse Action" Under Title 5, Section 7512, United States Code.

On the Government's motion for summary judgment, the petitioner, by the allegations of his complaint and by the evidence which he introduced into the administrative record, must be conceded to have been denied very valuable First Amendment rights, which this Court has decided deserve protection. See *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Arnett v. Kennedy*, 416 U.S. 134 (1974).[5]

Regardless of First Amendment considerations, the Fifth and Seventh Circuits are in conflict on the transfer aspect of the case.

In *Motto v. General Services Administration*, 335 F. Supp. 694 (E.D., La., 1971), *aff'd without opinion* in 502 F.2d 1165 (5th Cir., 1974), *cert. denied* 420 U.S. 927, 95 S. Ct. 1125, 43 L. Ed. 2d 398 (1975), Judge Rubin states:

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5. The Sixth Circuit's opinion refers to evidence and "proofs" in the administrative record. Once conceding the "pretext" issue, thus bringing the question of intent into play, there arose a factual issue which could not be resolved adverse to petitioner on the Government's motion for summary judgment. Compare *Motto v. General Services Administration et al.*, 335 F. Supp. 694 (E.D., La., 1971), *aff'd without opinion* in 502 F.2d 1165 (5th Cir., 1074), *cert. denied* 420 U.S. 927, 95 S. Ct. 1125, 43 L. Ed. 2d 398 (1975).

> "Motto contends his transfer was an adverse action, 5 U.S.C.A. § 7512, entailing an elimination of supervisory status, hence a reduction in rank, and he was entitled to written notice and a hearing. 5 U.S.C.A. § 7512(b). Whether or not he was a supervisor, Motto's transfer was ordered because he was considered an undesirable employee, and to induce his resignation. Hence it was an adverse action even if it entailed no reduction in rank * * *".

Although *McCourt v. Hampton et al.*, 514 F.2d 1365 (4th Cir., 1975) did not involve a transfer to another city, the Fourth Circuit (*infra*, p. 12) treats the "transfer" to another function as the "adverse action". Although there was a reduction in pay, that was a later event apart from the transfer itself. This view accords to that of the Fifth Circuit, namely that the transfer itself becomes the adverse action.

Pauley v. United States of America et al., 419 F.2d 1061 (7th Cir., 1969) decides exactly to the contrary. At page 1065, the Seventh Circuit states:

> "The parties appear to agree that the critical issue here is the reduction in rank question. Under relevant regulations 5 C.F.R. §751.101, et seq., a reduction in rank, but not a transfer, entitles an affected employee to the adverse action procedural protections of notice of the proposed action and the reasons therefor, and an opportunity to answer either personally, or in writing, or both. A reduction in rank requires the same procedural steps as in the case of a discharge. In the instant case, such procedural steps were not followed in connection with the transfer. They were followed when plaintiff was discharged for refusal to accept the transfer."

With the issue thus defined, the Seventh Circuit, again at page 1065, states:

> "Noticeably absent from the adverse action regulations is any provision determining how and by whom it is to be decided whether a given action constitutes one of the 'adverse actions' to which the regulations apply. Absent such provision, we cannot say that the procedure followed in this case violated the regulations."

Thus, under circumstances similar to those in the *Motto* case, affirmed by the Fifth Circuit, the Seventh Circuit decides that a transfer is not an adverse action, which is in complete conflict with the *Motto* rationale. The Sixth Circuit's holding (App. p. A18) that petitioner's transfer is not "adverse action" likewise is in direct conflict with the Fifth Circuit's affirmance of the decision in *Motto v. General Services Administration et al., supra.*

The importance of the procedure followed in petitioner's discharge from the government service is manifest. If the transfer had been an "adverse action", the reason for the transfer was petitioner's criticisms. These criticisms would have to be contained in the notice or statement of charges forming a basis for discharge or transfer. The agency then would have had the burden of proving that the criticisms were unfounded or were detrimental to the "efficiency of the service". This would have been most difficult in view of the fact that petitioner worked in Cleveland, Ohio, for over a year after the transfer was proposed under circumstances that saw one of the cases involved in the criticisms meet reversal by the National Office of its own policy with a resultant betterment to the revenues of $1,076,189.00 in accordance with petitioners' views.

II. A Conflict Has Developed Among the Circuits as to the Standard of Judicial Review of Federal Employee Discharges—an Area Affecting 2.5 Million Federal Employees. The District of Columbia, Third and Fourth Circuits Follow the "Substantial Evidence" Test and Also Permit Review of the Procedures Followed and Whether the Action Taken Was Arbitrary or Capricious. The Sixth and Seventh Circuits, However, Refuse to Follow the "Substantial Evidence" Rule and Narrowly Limit the Scope of Judicial Review.

Charlton v. United States, Macy et al., 412 F.2d 390 (3rd Cir., 1969), at page 395, states:

> "In summary, we are of the opinion that the scope of judicial review of a federal agency's action with respect to the dismissal or discipline of a civil service employee extends to the determination whether procedural requirements have been satisfied in the administrative proceedings, and whether the administrative record establishes that substantial evidence supports the agency's actions and that it was not arbitrary, capricious or an abuse of discretion."

McCourt v. Hampton et al., 514 F.2d 1365 (4th Cir., 1975) reiterates the "substantial evidence" test for the Fourth Circuit, when at page 1368 the Court states:

> "* * * we see two fatal errors in the administrative proceedings which require that McCourt be given substantially the relief he prayed. First, we conclude that McCourt was not afforded the statutory notice of his transfer to the defunct position to which he was entitled as a veteran protected by the Veterans Preference Act of 1944, 5 U.S.C. §851 et seq.; and, second, we conclude that since there was lacking substantial evidence to show that the position occupied by McCourt had been functionally changed, the decision of the Civil Service Commission sustaining McCourt's transfer and subsequent demotion must be set aside, * * *."

The Seventh Circuit follows a wholly different rule. In *Pauley v. United States et al.*, 419 F.2d 1061 (7th Cir., 1969), the Court at page 1065 states:

> "The overwhelming weight of authority holds that judicial review of employee disciplinary actions is limited to insuring that required procedures have been substantially complied with and that the action taken was not arbitrary or capricious. Brown v. Zuckert, 7 Cir., 349 F.2d 461, 463 (1965); McTiernan v. Gronouski, 2 Cir., 337 F.2d 31, 34 (1964); Seebach v. Cullen, 9 Cir., 338 F.2d 663, 664 (1964). See Keim v. United States, 177 U.S. 290, 20 S.Ct. 574, 44 L.Ed. 774 (1900); Eberlein v. United States, 257 U.S. 82, 84, 42 S.Ct. 12, 66 L.Ed. 140 (1921). Cf Kletschka v. Driver, 2 Cir., 411 F.2d 436 (1969); Norton v. Macy, D.C. Cir., 417 F.2d 1161 (1969). A majority in Charlton v. United States, 3 Cir., 412 F.2d 390, 393 (1969), however, announced a substantial evidence test which Judge Stahl rejected in a concurring opinion."

In *Brown v. Zuckert*, 349 F.2d 461 (7th Cir., 1965), cited and approved in *Pauley, supra*, the Seventh Circuit is even more explicit when, at page 463, it states:

> "In Seebach, supra, 338 F.2d at page 665, the Court emphasized '* * * (W)e do not review findings of fact in cases such as this'. We agree! It follows that plaintiff's argument directed to the unsubstantiality of the evidence is not the basis for judicial review. We, therefore, turn to a consideration of plaintiff's claim that his procedural rights were violated."

Baum v. Zuckert, 342 F.2d 145 (6th Cir., 1965) follows a similar rule when the Court states:

> "* * * We hold that no procedural errors were committed by the Air Force or the Civil Service Commission * * *."

The Sixth Circuit, in 523 F.2d, at page 1315 (App., p. A18) approves and follows *Pauley v. United States et al., supra,* and at page 1314 (App., p. A17) approves and follows *Baum v. Zuckert, supra,* as the rule of the Sixth and Seventh Circuits. This is squarely in conflict with the decisions of the Third and Fourth Circuits as well as the District of Columbia.

The District of Columbia adheres to the rule in the Third and Fourth Circuits and follows the substantial evidence test. In *Pelicone v. Hodges et al.,* 320 F.2d 754 (D.C. Cir., 1963), at page 755, the Court states:

> "Our review in this kind of case is limited to determining whether the statutory and regulatory procedures were observed and whether the challenged action was arbitrary and capricious or was supported by evidence. We conclude that the procedures were observed, but there is no evidence to support the charges upon which appellant's dismissal was rested. * * *."

Weinberg v. Macy et al., 360 F.2d 816 (D.C. Cir., 1965), follows and approves *Pelicone v. Hodges et al., supra.* Note also in *Weinberg v. Macy et al., supra,* the detailed manner in which the Court analyzes the evidence. Some of the Circuits have cited earlier decisions in the District of Columbia as supporting a different proposition. *Charlton v. United States, Macy et al., supra,* at pages 394 and 395, presents a detailed analysis of the earlier District of Columbia cases in such manner that there no longer can be

any doubt that the District of Columbia follows the substantial evidence test, as in *Pelicone v. Hodges et al., supra,* and *Weinberg v. Macy et al., supra.*

The scope of review presumably would involve Fifth Amendment considerations. It also involves the interpretation to be accorded Section 706, in Title 5 U.S.C., of the Administrative Procedures Act, as well as of the Fifth Amendment, in the discharge of a veterans preference eligible under Title 5, Sections 7511, 7512 and 7701, United States Code.

III. This Petitioner Was Denied Important Procedural and Substantive Safeguards. To Permit This to Happen Is to Endanger the Careers of All Government Employees.

Title 5, Section 7512(b), U.S.C., states:

> "(b) A preference eligible employee against whom adverse action is proposed is entitled to—
>
> (1) at least 30 days' advance written notice, except when there is reasonable cause to believe him guilty of a crime for which a sentence of imprisonment can be imposed, stating any and all reasons, specifically and in detail, for the proposed action;
>
> (2) a reasonable time for answering the notice personally and in writing and for furnishing affidavits in support of the answer; and
>
> (3) a notice of an adverse decision."

The statute anticipates that the employee ordinarily will remain on the payroll for at least 30 days after notice, thus permitting the employee a reasonable time to submit oral and written replies. The advance written notice in turn presumably contains the specific reasons for adverse action.

As to petitioner, what was done does not accord to the intent of this statute.

He was removed from the payroll on the date of transfer and carried in an absent without leave status. The actual removal action therefore was immediate. He thereafter received the advance notice. It gave the refusal to accept the transfer as the reason for the proposed adverse action and thus avoided any mention of petitioner's criticism, which was the real reason for the removal action. The technical removal then was made retroactive to the transfer date.

This procedure alone was unusual. The circumstances attendant the second and final removal were even more so. Actually there had never been a reinstatement. The transfer again was used as the reason for the removal action, thus once more avoiding the criticism which was the real reason for the adverse action. Since petitioner had never been placed back on the payroll, he never received a 30 day "advance" notice. The 46 missing documents (footnote 4) take perspective in this background. Title 5, U.S.C. Section 7701, anticipates review of the agency's action. Whether a proper review was made by the Civil Service Commission must always be subject to question, for example, where initials can be blocked out, thus disguising the role of the personnel officer hearing the second oral reply. The July 20, 1965, letter assigning petitioner's criticisms as the reasons for transfer goes to the very crux of the case. The removal of the other documents was equally significant.

This petitioner's career as an IRS agent extended over a period of twelve years. He was sufficiently competent to appear in public taxpayer programs, on radio and television, and to travel to a dozen countries overseas as an

official representative of his Government. All of the procedures followed here—including the removal of these documents—were detrimental to petitioner's career. To disregard procedures in this manner endangers the careers of all government employees.

IV. The Sixth Circuit Clearly Is in Error and in Conflict With Its Own Prior Decision and Those of the Other Circuits in Sustaining the District Court's Deciding This Case on the Government's Motion for Summary Judgment.

It was error for the District Judge to sustain the Government's motion for summary judgment. Petitioner had presented a genuine issue of fact involving the intent of the official making the transfer, thus bringing the question of "pretext" into play, by the Sixth Circuit's own interpretation.

73 AM. JUR. 2d 726, *Summary Judgment*, Section 4, states:

> "* * * There are three classes of litigation which are not usually suited for summary disposition, namely, negligence actions, cases where motive, intent, consciousness, conscience, or subjective feelings and reactions are involved, and equitable actions. * * *."

Friedman et al. v. Meyers et al., 482 F.2d 435 (2d Cir., 1973), to the same effect, at page 439, states:

> "The other claims and defenses in the present suit bristle with genuine issues as to the material facts. For instance, issues are raised as to the state of mind, intent and knowledge of the parties. We have repeatedly stated that summary judgment is particularly inappropriate where, as here, it is sought on the basis of 'the inferences which the parties seek to have drawn (as to) questions of motive, intent, and sub-

jective feelings and reactions.' (citation of cases omitted) * * *."

In accord with this view, see also *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914, at page 918 (7th Cir., 1974). For purposes of the Government's motion for summary judgment, there was a material issue of fact, involving intent, pretext and subterfuge. To decide in the Government's favor on its motion for summary judgment was entirely inappropriate.

That petitioner filed a cross motion for summary judgment does not alleviate this error. *Begnaud et al. v. White*, 170 F.2d 323 (6th Cir., 1948), at page 327, states:

> "* * * that both parties make motions for summary judgment * * * does not require the Court to rule that no fact issue exists. Each, in support of his own motion, may be willing to concede certain contentions of his opponent, which concession, however, is only for the purpose of the pending motion. If the motion is overruled, the concession is no longer effective * * *."

Begnaud et al. v. White, supra, has been approved in the Sixth Circuit as late as 1974 and has been cited and approved in other Circuits. See, e. g., *Tee Pac, Inc. v. St. Regis Paper Company*, 491 F.2d 1193, 1196 (6th Cir., 1974); *Rota et al. v. Brotherhood of Railway, Airline and Steamship Clerks et al.*, 489 F.2d 998, 1004 (7th Cir., 1973); *Allied Mutual Insurance Company v. Lysne et al.*, 324 F.2d 290, 292 (8th Cir., 1963); and *Brawner v. Pearl Assurance Company, Ltd. et al.*, 267 F.2d 45, 46 (9th Cir., 1958).

The Sixth Circuit's decision in the instant case that the filing of a cross motion for summary judgment precluded the review of evidence in the administrative record is clearly erroneous. Its decision in this regard also is in conflict with its own prior decision and those in other Circuits.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

JAMES F. SEXTON
Counsel for Petitioner

APPENDIX

MEMORANDUM AND ORDER OF THE DISTRICT COURT

(Filed May 30, 1972)

Case No. C70-883

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES F. SEXTON,
Plaintiff,

v.

DAVID M. KENNEDY, *et al.*,
Defendants.

MEMORANDUM AND ORDER

GREEN, *J.*:

This case arises out of a decision by the Internal Revenue Service, affirmed by the United States Civil Service Commission on September 17, 1968, to dismiss plaintiff from federal service. Plaintiff's dismissal was by reason of his refusal to accept a transfer of duty station.

In his complaint, filed on September 16, 1970, plaintiff alleges that his transfer was arbitrary, capricious and in violation of his first amendment rights. He then contends that his discharge, being as a consequence of his

refusal to accept the unlawful transfer, is necessarily invalid. For his relief, plaintiff seeks, *inter alia,* retroactive reinstatement as an Internal Revenue Agent in Cleveland, Ohio.

Defendants, Secretary of the Treasury, Commissioner of Internal Revenue Service, and three Commissioners of the United States Civil Service Commission, have filed a motion to dismiss the complaint, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. They allege that there is no venue in this District, that plaintiff has failed to state a claim upon which relief can be granted, and that the plaintiff is guilty of laches in filing this action. There were at the time the said motion was filed, a number of non-governmental defendants joined as parties to the complaint, who have since been dismissed on motion.

While defendants denominate this pleading as a motion to dismiss under Rule 12(b), the addition of supporting affidavits obligates the Court to treat this as a motion for summary judgment under Rule 56, F.R.C.P. 2A *Moore's* Federal Practice ¶12.09[3]. Pursuant thereto, the Court has considered the affidavits and briefs of both parties to determine if there is a genuine issue as to any material fact.

The motion to dismiss for improper venue is predicated on the joinder of the non-government defendants. However, with their subsequent dismissal, it appears that venue is now proper in this court under 28 U.S.C. §1391 (e), this being the district wherein plaintiff resides and all defendants being officers or employees of the United States or an agency thereof.

Defendants' allegation that plaintiff has failed to state a claim upon which relief can be granted is also predicated on the joinder of the non-governmental defendants. Again, with the subsequent dismissal of all but the present defendants that argument is substantially undercut. It appears to the Court that the complaint, although it contains much surplusage and irrelevant allegations, is sufficient to state a claim for relief. *See, Motto v. General Services Adm.,* 335 F. Supp. 694 (E.D. La., 1971).

Defendants' final assertion is that plaintiff, by waiting almost two years to file this suit, and by failing to show any reason for the delay, is guilty of laches. However, laches is an affirmative factual defense with the party asserting it carrying the burden of satisfying the court that the adverse party's conduct should preclude him from a right of recovery. In the Court's opinion such a question is not appropriate for decision based upon the present record. Defendants may, if they wish, continue to assert such defense in their answer for the Court's consideration at a proper time.

The motion to dismiss will be denied.

IT IS SO ORDERED.

/s/ BEN C. GREEN
United States District Judge

MEMORANDUM AND ORDER OF THE DISTRICT COURT

(Filed July 3, 1974)

Case No. C70-883

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES F. SEXTON,
Plaintiff,

v.

DAVID M. KENNEDY, *et al.*,
Defendants.

MEMORANDUM AND ORDER

GREEN, *J.*:

In a memorandum and order dated May 11, 1973, this Court stayed proceedings on cross-motions for summary judgment in this case pending a decision by the Supreme Court in a case now reported as *Arnett v. Kennedy,* 42 L.W. 4513 (1974). That decision having been rendered, and supplemental briefs with regard thereto having been filed by both sides in this case, the Court is now prepared to rule on the cross-motions for summary judgment.

Plaintiff was originally separated from the Internal Revenue Service on November 4, 1966 for failing to report for reassignment from Cleveland, Ohio to Dayton, Ohio. No change in plaintiff's rank or compensation was involved in the reassignment.

This reassignment, based on the Regional Commissioner's finding of an inability to conform to proper supervision in the Cleveland office, went through the available appeals procedures, and was confirmed upon administrative appeal.

Plaintiff then refused to report for duty to Dayton, and was thereafter separated for refusal to report as directed. Plaintiff then appealed his separation to the Civil Service Commission, Chicago Region, and finally to the Board of Appeals and Review, where his dismissal was reversed and he was ordered restored to the Internal Revenue Service rolls in Dayton, Ohio. *Record,* p. 257.[1] The reversal was based on a finding that "the agency had unduly limited [plaintiff's] right of oral reply to the removal charge." *Record,* p. 11.

Plaintiff again failed to report for duty in Dayton, and on July 6, 1967, he was informed by the Regional Commissioner that, under 5 C.F.R. Part 752:

> In order to promote the efficiency of the service, it is proposed to remove you from the Service or otherwise discipline you at any time after thirty (30) calendar days from the date you received this letter. *Record,* p. 259.

This same letter informed plaintiff of the procedural rights available to him for review of this new adverse action, as well as the charges and supporting specifications.

Thereafter, plaintiff made several written replies, and on November 3, 1967, an oral reply. *Record,* p. 213. On December 14, 1967, plaintiff was notified that the Regional Commissioner found the charge and supporting specifica-

1. Record references cited herein are to the administrative record, which is in evidence herein as an exhibit to the motions for summary judgment.

tions to be sustained, and that in order to promote the efficiency of the service, he was to be removed on December 29, 1967. Plaintiff was also advised of his appeal rights, which he perfected through the Civil Service Commission and Board of Appeals and Review. Both reviewing agencies upheld the Regional Commissioner's finding and found no error in the removal proceeding.

As to the cross-motions for summary judgment, the plaintiff argues that his dismissal from the Internal Revenue Service was an arbitrary and capricious act, contending that such position is supported by a 452 page file compiled by the Civil Service Commission through various stages of appeal. Plaintiff also argues that two letters which he wrote dated May 19, 1964 and March 7, 1965, which critized his supervisor, and which plaintiff claims were the motivating reason for his allegedly illegal transfer, are missing from his administrative file "and this alone makes the government's case fatally defective in view of the importance of the document[s]." Apparently, plaintiff contends that such letters would prove that his original transfer was based on criticism of his supervisors, and that such a reason is arbitrary, capricious and in violation of his First Amendment rights.

The government argues that on review, this Court is limited in its scope to a determination of whether applicable due process requirements were met in the administrative review process, and whether the dismissal for refusal to accept transfer was arbitrary and capricious. The government continues that the removal for failure to accept reassignment and the subsequent review were both procedurally and substantively correct, and that the original order of transfer was not such an adverse proceeding requiring the procedural protections given plaintiff in the later review procedures.

As to the scope of a reviewing court on a discharge of a Civil Service employee, the Sixth Circuit Court of Appeals has stated that:

> The judicial function is to determine whether there has been substantial compliance with applicable procedures and statutes, and not to review the administrative determination as to the wisdom or good judgment of the agency in exercising its discretion. [Citations omitted]. *Baum v. Zuckert,* 342 F. 2d 145, 147 (CA 6, 1965).

The Court must, therefore, ascertain what the applicable statutes and procedures are, and whether there has been substantial compliance with same.

Under 5 U.S.C. §7512(b), a "preference eligible employee", such as plaintiff, against whom an "adverse action" is proposed, is entitled to:

> (1) at least 30 days' advance written notice, . . . stating any and all reasons, specifically and in detail, for the proposed action;
>
> (2) a reasonable time for answering the notice personally and in writing and for furnishing affidavits in support of the answer; and
>
> (3) a notice of an adverse decision.

An adverse action then is defined as a "removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay." 5 U.S.C. §7511(2).

Although it would appear that a transfer is not an adverse action within the terms of the statute, plaintiff maintains that it is within the meaning thereof. In *Motto v. General Services Administration,* 335 F. Supp. 694 (E.D.

La., 1971), the court stated that, considering 5 U.S.C. §7512 (b):

> Motto's transfer was ordered because he was considered an undesirable employee, and to induce his resignation. Hence it was an adverse action even if it entailed no reduction in rank. *Id.* at p. 696.

In *Motto*, however, plaintiff had resigned rather than accept transfer, and was able to get a hearing on the merits on his "appeal" to the district court. In this case, plaintiff chose to ignore the transfer and fight the subsequent removal action through the designated administrative proceedings. As was stated earlier, in such a case, a federal court is prohibited from reconsidering the merits of the case. Consequently, the type of hearing afforded in *Motto* is not applicable in this court at this juncture of the proceedings.

There is no evidence in the record that plaintiff was transferred in order to induce his resignation or in order to chill his First Amendment rights. In fact, the Board of Appeals and Review specifically found that:

> The agency's decision to effect the reassignment was within its administrative prerogative and there is no evidence that the reassignment was arbitrary, capricious or unreasonable. Since there was no reduction in rank or compensation, there was no violation of adverse action procedures required by the Veteran's Preference Act. [5 U.S.C. §7512]. *Record*, p. 14.
>
> * * *
>
> The preponderance of the evidence does not indicate that appellant's reassignment was designed to "stifle valid criticism directed to the handling of tax liabil-

> ities." Instead, it indicates inability of appellant to get along with his supervisors because of an exaggerated idea of his own abilities. *Record*, p. 15.

In *Arnett v. Kennedy*, 42 L.W. 4513 (1974), the Supreme Court stated, in regards to the statutory scheme for removing a competitive service employee:

> Where the focus of legislation was this strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause. *Id.* at p. 4518.

While this decision deals with removal of competitive service employees, the Court does not believe that the difference is of any consequence. What is important is the fact that the due process rights granted by Congress are virtually the same for both preference eligible employees and competitive service employees.

This Court must, therefore, conclude that: (1) plaintiff's transfer to Dayton, Ohio was not such an adverse action as contemplated in 5 U.S.C. §7512(b)(3); (2) the record amply demonstrates that the reassignment was neither arbitrary, capricious nor unreasonable; and (3) all other procedural due process rights granted under the Veteran's Preference Act were given to plaintiff during the appeal of his removal from service.

As to the matter of two missing letters from plaintiff's file, the Court has thoroughly read the record and is convinced that the letters were fully considered by the respective appellate agencies. Since this Court is limited to determining whether applicable due process rights were granted plaintiff, the actual contents of the missing letters are immaterial to such a decision. The other 41 "missing" items, ranging from letters for requested interviews to potential witnesses to photostatic copies of Internal Revenue Service bulletins, are also immaterial to this proceeding.

In conclusion, the record demonstrates that plaintiff's transfer was not an abuse of administrative discretion and that there has been substantial compliance with the procedural due process rights granted by Congress under 5 U.S.C. §7512. Therefore, plaintiff's motion for summary judgment will be denied and defendants' cross-motion for summary judgment will be granted.

IT IS SO ORDERED.

/s/ BEN C. GREEN
United States District Judge

ORDER OF THE DISTRICT COURT

(Filed July 3, 1974)

Case No. C70-883

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES F. SEXTON,
Plaintiff,

v.

DAVID M. KENNEDY, *et al.*,
Defendants.

ORDER

GREEN, *J.*

UPON CONSIDERATION of plaintiff's motion for summary judgment and defendants' cross-motion for summary judgment,

IT IS HEREBY ORDERED that defendants' cross-motion for summary judgment is granted, and plaintiff's motion for summary judgment is denied; judgment is entered in favor of defendants dismissing the plaintiff's complaint; see this Court's memorandum of even date.

/s/ BEN C. GREEN
United States District Judge

OPINION OF THE COURT OF APPEALS

(Filed October 2, 1975)

No. 74-2377

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES F. SEXTON,
Plaintiff-Appellant,

vs.

DAVID M. KENNEDY, Secretary of the Treasury, *et al.*,
Defendants-Appellees.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Before: EDWARDS and PECK, Circuit Judges, and FEIKENS,* District Judge.

EDWARDS, Circuit Judge. Appellant Sexton appeals from the judgment of the United States District Court for the Northern District of Ohio, Eastern Division, denying his motion for a summary judgment and granting the summary judgment motion of the government. The effect of the judgment was to sustain his discharge from government employment.

Sexton had been an IRS agent for some ten years before his continuing commentary about the quality of his

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*Honorable John Feikens, United States District Judge for the Eastern District of Michigan, Southern Division, sitting by designation.

supervision resulted in his transfer (on grounds of incompatibility) from the Cleveland IRS office to that in Dayton. Sexton refused to go and was fired for refusing to report at the Dayton office. He then appealed to the Civil Service Commission and was restored to his job on procedural grounds, but was again ordered to report to Dayton. Again he refused and again he was fired. No back pay was paid him for the period between the first and the second discharge.

The District Judge who heard this case on affidavits and the lengthy administrative record provided an accurate summary of the factual details:

> Plaintiff was originally separated from the Internal Revenue Service on November 4, 1966 for failing to report for reassignment from Cleveland, Ohio to Dayton, Ohio. No change in plaintiff's rank or compensation was involved in the reassignment.
>
> This reassignment, based on the Regional Commissioner's finding of an inability to conform to proper supervision in the Cleveland office, went through the available appeals procedures, and was confirmed upon administrative appeal.
>
> Plaintiff then refused to report for duty to Dayton, and was thereafter separated for refusal to report as directed. Plaintiff then appealed his separation to the Civil Service Commission, Chicago Region, and finally to the Board of Appeals and Review, where his dismissal was reversed and he was ordered restored to the Internal Revenue Service rolls in Dayton, Ohio. The reversal was based on a finding that "the agency had unduly limited [plaintiff's] right of oral reply to the removal charge."

Plaintiff again failed to report for duty in Dayton, and on July 6, 1967, he was informed by the Regional Commissioner that, under 5 C.F.R. Part 752:

> In order to promote the efficiency of the service, it is proposed to remove you from the Service or otherwise discipline you at any time after thirty (30) calendar days from the date you receive this letter.

This same letter informed plaintiff of the procedural rights available to him for review of this new adverse action, as well as the charges and supporting specifications.

Thereafter, plaintiff made several written replies, and on November 3, 1967, an oral reply. On December 14, 1967, plaintiff was notified that the Regional Commissioner found the charge and supporting specifications to be sustained, and that in order to promote the efficiency of the service, he was to be removed on December 29, 1967. Plaintiff was also advised of his appeal rights, which he perfected through the Civil Service Commission and Board of Appeals and Review. Both reviewing agencies upheld the Regional Commissioner's finding and found no error in the removal proceeding.

Appellant Sexton's first claim of substance is that his transfer to the Dayton IRS office was pure pretext employed for the purpose of effecting his discharge. He claims that IRS action was motivated by his criticism of his superior officers' "improper handling of tax cases" and asserts that his discharge violated his free speech rights and his right to petition for redress of grievances under the First Amendment.

The IRS's position on this issue is stated thus in the government's brief:

> As justification for the Appellant's removal, Mr. Hunter stated that the record established that the Appellant was "feuding" with IRS District Officials as far back as 1959, that he had the reputation as a trouble-maker, and that his repeated accusations against his supervisors in Cleveland, both oral and written, clearly evidenced his inability or refusal to accept their supervision. Thereafter, the Regional Commissioner directed the Appellant to a new post of duty in an adjacent district in hopes that he could apply himself in a new environment. Mr. Hunter further stated that instead of viewing the reassignment as an opportunity, the Appellant added this to his list of "fancied" grievances. Therefore, when the Appellant refused to go to Dayton, as directed the Regional Commissioner had no alternative but to remove him.

The other two issues which warrant comment are Sexton's claim that 46 documents were "missing" from his administrative file when it was presented before the Civil Service Commission and that he was improperly denied back pay for the time between the first discharge and the second.

As to appellant Sexton's claim that the transfer to Dayton was a pretext designed to force him to quit, the District Judge found as follows:

> There is no evidence in the record that plaintiff was transferred in order to induce his resignation or in order to chill his First Amendment rights. In fact, the Board of Appeals and Review specifically found that:

The agency's decision to effect the reassignment was within its administrative prerogative and there is no evidence that the reassignment was arbitrary, capricious or unreasonable. Since there was no reduction in rank or compensation, there was no violation of adverse action procedures required by the Veteran's Preference Act. [5 U.S.C. § 7512].

* * *

The preponderance of the evidence does not indicate that appellant's reassignment was designed to "stifle valid criticism directed to the handling of tax liabilities." Instead, it indicates inability of appellant to get along with his supervisors because of an exaggerated idea of his own abilities.

In *Arnett v. Kennedy,* [416 U.S. 131] (1974), the Supreme Court stated, in regards to the statutory scheme for removing a competitive service employee:

> Where the focus of legislation was this [sic] strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause. *Id.* at [152].

While this decision deals with removal of competitive service employees, the Court does not believe that the difference is of any consequence. What is important is the fact that the due process rights granted by Congress are virtually the same for both preference eligible employees and competitive service employees.

This Court must, therefore, conclude that: (1) plaintiff's transfer to Dayton, Ohio was not such an adverse action as contemplated in 5 U.S.C. § 7512(b)(3); (2) the record amply demonstrates that the reassignment was neither arbitrary, capricious nor unreasonable; and (3) all other procedural due process rights granted under the Veteran's Preference Act were given to plaintiff during the appeal of his removal from service.

We have read this record, including what appellant had to say about his superiors, and agree that appellant's due process rights as spelled out by statute were observed. Neither the District Court nor this court has the responsibility or the power to act as a super Civil Service Commission. This court has stated the principal subject of judicial review on discharge of a federal Civil Service employee as follows:

> The function of a reviewing court in cases involving the discharge of civil service employees is a limited one. *Powell v. Brannan,* 91 U.S.App.D.C. 16, 196 F.2d 871, 873. The judicial function is to determine whether there has been substantial compliance with applicable procedures and statutes, and not to review the administrative determination as to the wisdom or good judgment of the agency in exercising discretion. *Hargett v. Summerfield,* 100 U.S.App.D.C. 85, 243 F.2d 29, 32, cert. denied, 353 U.S. 970, 77 S.Ct. 1060, 1 L.Ed. 2d 1137. *Baum v. Zuckert,* 342 F.2d 145, 147 (6th Cir. 1965).

We note, of course, that appellant relies upon the Veterans Preference Act[1]—specifically upon 5 U.S.C. § 7512

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1. Act of June 27, 1944, ch. 287, 58 Stat. 387, codified as 5 U.S.C. §§ 7511, 7512, 7701 (1970).

(b) (1970). But we also note that the procedures required by this statute were carefully followed by the agency in the last discharge which is under review here.

Clearly a transfer of a government employee to another station without reduction of rank or pay is not per se "adverse action" within the meaning of the Veterans Preference Act. 5 U.S.C. § 7511(2) (1970). Even more clearly, discharge of such an employee for failure to report to work on such a reassignment is not "arbitrary and capricious" agency action. *Pauley v. United States,* 419 F.2d 1061 (7th Cir. 1969).

In this case Judge Hastie employed some reasoning which we believe is applicable here:

> Far from being without any rational basis, we find the dismissal of plaintiff to be fully supported by the record. It is clear that if the reassignment was proper, the dismissal was proper. The Federal Personnel Manual, Ch. 715-9, Subch. 3-1, provides that "when any agency has found it necessary to assign an employee to a position in a different geographical or organizational location, and an employee refuses to accept the new assignment, his services may be terminated."
>
> The transfer in this case was clearly proper. The Department of Agriculture after an extensive investigation of plaintiff's performance in Chicago concluded that he could not get along with the people working under him. It has been held, and it seems indisputable, that "strained personal relations" between an employee and his co-workers "would appear to provide a permissible basis for a transfer * * *." *Kletschka v. Driver,* 2 Cir., 411 F.2d 436, 443 (1969).

> We have reviewed the record sufficiently to conclude that the Civil Service Commission could have rationally found that this was the reason for the reassignment of plaintiff. Plaintiff's resulting dismissal was not the consequence of an arbitrary or capricious action. *Pauley v. United States, supra* at 1066-67.

This, however, does not fully dispose of plaintiff's principal argument on this appeal. For no matter how fair procedures may be on surface appearance, if in fact they are employed to conceal a purpose violative of the federal Constitution, there must be a remedy. *Yick Wo v. Hopkins,* 118 U.S. 356, 373-74 (1886); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 392 (1971). Thus if plaintiff had made his case that his transfer was a mere pretext to suppress his First Amendment rights, he might still prevail. *See generally Motto v. General Services Administration,* 335 F. Supp. 694 (E.D. La. 1971), *aff'd,* 502 F.2d 1165 (5th Cir. 1974), *cert. denied,* 420 U.S. 927 (1975).

In *Arnett v. Kennedy,* 416 U.S. 134 (1974), the plurality opinion, discussing a similar federal employee protection act,[2] said:

> Since Congress when it enacted the Lloyd-La Follette Act did so with the intention of conferring job protection rights on federal employees which they had not previously had, it obviously did not intend to authorize discharge under the Act's removal standard for speech which is constitutionally protected. The Act proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes

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2. The Lloyd-LaFollette Act, Act of August 24, 1912, ch. 389, § 6, 37 Stat. 555, codified as 5 U.S.C. § 7501 (1970).

no greater controls on the behavior of federal employees than are necessary for the protection of the Government as an employer. Indeed the Act is not directed at speech as such, but at employee behavior, including speech, which is detrimental to the efficiency of the employing agency. We hold that the language "such cause as will promote the efficiency of the service" in the Act excludes constitutionally protected speech, and that the statute is therefore not overbroad. *Colten v. Kentucky,* 407 U.S., at 111. *Arnett v. Kennedy, supra* at 162.

On this aspect of the matter, however, we simply do not find proofs in the administrative record or in the District Court record which suggest reversal of the findings adverse to appellant entered in both forums.

The Board of Appeals and Review found that the criticisms indicated "inability of appellant to get along with his supervisors because of an exaggerated idea of his own abilities." As to this issue the District Judge found that the record amply demonstrates that the reassignment was neither "arbitrary, capricious nor unreasonable"; and we agree.

Appellant had an opportunity to present evidence on this issue at the Civil Service hearing and failed to convince the body designated by law to protect federal employees from unjust discharge. Before the District Court appellant joined in cross-motions for summary judgment under Rule 56, Federal Rules of Civil Procedure. He thus chose to rest his case upon the administrative record, plus exhibits. The written record presented to this court does not support any finding by us that the agency discharge was arbitrary and capricious or that the District Court's findings were clearly erroneous.

As to the other two issues which we believe merit comment, we can be much more brief. Appellant argued orally and by brief that his case had been materially prejudiced by the absence of some 46 "missing" documents. Our inspection of this record and of the documents themselves indicates that they were "missing" only in the sense that they were not included in appellant's administrative file. They clearly were before the District Court in its consideration of this case.

Further, we find nothing sinister in their omission from the administrative file. The "missing" documents appear to us to have had little, if anything, to do with the merits of plaintiff's claims. Whether to include them or not was clearly an administrative decision.

As to appellant's contention that in any event he should be paid back pay for the period between his first and second discharge, the applicable statute provides as follows:

> (b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—
>
> (1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

> (2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation. 5 U.S.C. § 5596(b) (1970).

The Civil Service Commission's reversal of the first discharge order was clearly upon procedural grounds, but it might well be held to represent a finding that the first discharge was "unwarranted."

The statute, however, also authorizes the Civil Service Commission to "prescribe regulations to carry out this section." 5 U.S.C. § 5596(c) (1970). Under that authority the Civil Service Commission has adopted the following regulation:

> (d) In computing the amount of back pay under this section and section 5596 of title 5, United States Code, the agency may not . . .(2) include any period during which the employee was unavailable for the performance of his job and his unavailability was not related to, or caused by, the unjustified or unwarranted personnel action. 5 C.F.R. § 550.804(d)(2) (1975).

Since we have already held that the IRS order transferring appellant to Dayton was within the agency's administrative discretion, appellant's failure to report must be held to be "unavailability . . . not related to or caused by, the . . . unwarranted personnel action." Under this regulation appellant was not entitled to back pay.

The judgment of the District Court is affirmed.

ORDER OF THE COURT OF APPEALS

(Filed October 30, 1975)

No. 74-2377

UNITED STATES COURT APPEALS
FOR THE SIXTH CIRCUIT

JAMES F. SEXTON,
Plaintiff-Appellant,

vs.

DAVID M. KENNEDY, Secretary of the Treasury, et al.,
Defendants-Appellees.

ORDER

Before: EDWARDS and PECK, *Circuit Judges*, and FEIKENS,* *District Judge*.

On receipt and consideration of a petition for rehearing in the above-styled case; and

For disqualification of all judges of the Sixth Circuit,

Said motions are hereby denied.

Entered by order of the Court
/s/ JOHN P. HEHMAN
Clerk

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*Honorable John Feikens, United States District Judge for the Eastern District of Michigan, Southern Division, sitting by designation.

UNITED STATES CONSTITUTION AND STATUTES

Constitution of the United States, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. §706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

5 U.S.C. §7511

§ 7511. Definitions

For the purpose of this subchapter—

(1) "preference eligible employee" means a permanent or indefinite preference eligible who has completed a probationary or trial period as an employee of an Executive agency or as an individual employed by the government of the District of Columbia, but

does not include an employee whose appointment is required by Congress to be confirmed by, or made with the advice and consent of, the Senate, except an employee whose appointment is made under section 3311 of title 39; and

(2) "adverse action" means a removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 528.

5 U.S.C. §7512

§ 7512. Cause; procedure; exception

(a) An agency may take adverse action against a preference eligible employee, or debar him for future appointment, only for such cause as will promote the efficiency of the service.

(b) A preference eligible employee against whom adverse action is proposed is entitled to—

(1) at least 30 days' advance written notice, except when there is reasonable cause to believe him guilty of a crime for which a sentence of imprisonment can be imposed, stating any and all reasons, specifically and in detail, for the proposed action;

(2) a reasonable time for answering the notice personally and in writing and for furnishing affidavits in support of the answer; and

(3) a notice of an adverse decision.

(c) This section does not apply to the suspension or removal of a preference eligible employee under section 7532 of this title. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 528.

5 U.S.C. §7701

§ 7701. Appeals of preference eligibles

A preference eligible employee as defined by section 7511 of this title is entitled to appeal to the Civil Service Commission from an adverse decision under section 7512 of this title of an administrative authority so acting. The employee shall submit the appeal in writing within a reasonable time after receipt of notice of the adverse decision, and is entitled to appear personally or through a representative under regulations prescribed by the Commission. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority and shall send copies of the findings and recommendations to the appellant or his representative. The administrative authority shall take the corrective action that the Commission finally recommends. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 530.

Supreme Court, U. S.
FILED
APR 30 1976
MICHAEL RODAK, JR., CLERK

No. 75-1219

In the Supreme Court of the United States

OCTOBER TERM, 1975

JAMES F. SEXTON, PETITIONER

v.

WILLIAM E. SIMON, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Solicitor General,
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Washington, D.C. 20530.

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Petitioner brought this action in the United States District Court for the Northern District of Ohio, seeking reinstatement to government employment as an Internal Revenue agent in Cleveland, Ohio. The district court granted summary judgment for the government, holding that petitioner's reassignment from the IRS district office in Cleveland, Ohio, to the IRS district office in Dayton, Ohio, was not an abuse of administrative discretion, and that his subsequent discharge for failure to report for duty in Dayton was lawful (Pet. App. A4-A10). The court of appeals affirmed (Pet. App. A12-A22).

Petitioner was an employee of the Internal Revenue Service at its Cleveland, Ohio, office from 1954 to August 1966. As a result of petitioner's incompatability with his supervisors in the Cleveland office, and the disruption of the work of the office that was occasioned

by his frequent complaints (R. 15, 46-47, 66-68, 96-112, 136-155, 185),[1] petitioner was reassigned by the Regional Commissioner of the IRS, at the same position and salary, to the IRS district office in Dayton, Ohio, effective August 29, 1965. Petitioner objected to the reassignment and filed a grievance petition. The reassignment was postponed pending resolution of this grievance. On June 20, 1966, the Director of Personnel, Department of the Treasury, affirmed the reassignment to Dayton, and it became effective on August 28, 1966 (see R. 259-260, 447).

Petitioner failed to report for duty at the IRS office in Dayton on August 28, 1966. The Regional Commissioner issued a notice of proposed discharge (R. 399-400), and petitioner was placed in "absent without leave" status until November 4, 1966, at which time he was separated for declining assignment to Dayton (R. 293, 400). Petitioner appealed, contending that the reassignment was illegal, and, accordingly, that he should not be removed from service for failing to accept the reassignment (R. 403-407). The Regional Commissioner of the IRS (R. 379-381) and the Regional Office of the Civil Service Commission (R. 289-297) sustained the discharge without permitting petitioner to reargue the propriety of the transfer, which had been sustained in the earlier grievance proceeding. However, the Board of Appeals and Review of the Civil Service Commission, in a decision issued on May 17, 1967, held that petitioner had a right to challenge the propriety of the transfer. Accordingly, the Board reversed the discharge action as "procedurally defective," and recommended that petitioner be restored to government service retroactive to November 4, 1966 (R. 273-276). Thereafter, the IRS Regional

[1]"R." refers to the Administrative Record.

Commissioner again assigned petitioner to the Dayton office, with a reporting date of June 12, 1967 (extended to June 26, 1967 at petitioner's request) (R. 260, 267-269).

Petitioner again failed to report, and on July 6, 1967, a new notice of proposed discharge was issued by the Regional Commissioner of IRS (R. 259-262). Petitioner this time was afforded the opportunity to make written and oral responses urging that the original transfer was improper (R. 213, 244-256). On December 14, 1967, the Regional Commissioner of IRS notified petitioner that he had reviewed petitioner's responses and had concluded that petitioner, having refused to accept the reassignment, should be removed effective December 29, 1967 "in order to promote the efficiency of the Service" (R. 198).

Petitioner appealed this decision to the Regional Office of the Civil Service Commission (R. 192-197). A hearing was held on April 11, 1968, the main issue being the propriety of the transfer from Cleveland to Dayton (R. 61-115).[2] In its decision of June 18, 1968, the Regional Office found that petitioner had failed to report for duty in Dayton on June 26, 1967, and that the transfer from Cleveland to Dayton was a proper exercise of the agency's prerogative in view of friction between petitioner and his supervisor, and was not a reprisal (R. 42-48). This decision was affirmed by the Board of

[2]Petitioner also claimed back pay for the period from August 28, 1966 to June 26, 1967, citing the recommendation of the Civil Service Commission that he be restored retroactively to service from November 4, 1966. The General Accounting Office in a letter of November 20, 1968, denied back pay on the ground that an employee must be "ready, willing and able to perform [his] duties" in order to receive back pay, and that petitioner's refusal to report for assigned duties on June 26, 1967, barred back pay.

Appeals and Review of the Civil Service Commission (R. 11-16). In its Finding No. 11, the Board stated (R. 15):

> The preponderance of the evidence does not indicate that appellant's reassignment was designed "to stifle valid criticism directed to the handling of tax liabilities". Instead, it indicates inability of appellant to get along with his supervisors because of an exaggerated idea of his own abilities.

The Board denied a petition for reconsideration (R. 1-2, 3-6).

Petitioner thereafter initiated this action in the district court, contending that his transfer and subsequent discharge were illegally motivated by his criticism of his supervisors and hence was arbitrary, capricious, and violative of his First Amendment rights (Compl., para. 15). The district court, upon its own review of the record, held that the removal action conformed with applicable procedures and was not an abuse of administrative discretion (Pet. App. A4-A10). The court of appeals affirmed (Pet. App. A12-A22).

The court of appeals, while stating that a government transfer is not *per se* reviewable as "adverse action" (Pet. App. A18; see 5 U.S.C. 7511 and 7512), acknowledged that "if plaintiff had made his case that his transfer was a mere pretext to suppress his First Amendment rights, he might still prevail" (Pet. App. A19), citing *Motto* v. *General Services Administration,* 335 F. Supp. 694 (E.D. La.), affirmed, 502 F.2d 1165 (C.A. 5), certiorari denied, 420 U.S. 927.

However, the court of appeals went on to observe that the Civil Service Commission here had found that the criticisms in question indicated "inability of appellant to get along with his supervisors because of an exaggerated idea of his own abilities" (R. 15; Pet. App. A20). The court continued: "As to this issue the District Judge found that the record amply demonstrates that the

reassignment was neither 'arbitrary, capricious nor unreasonable'; and we agree" (Pet. App. A20). The court of appeals accordingly upheld the district court's ruling that the transfer was not unlawful.

The court of appeals further held that certain documents allegedly "missing" from the administrative record, which had been examined by the district court, "had little, if anything, to do with the merits of plaintiff's claims" (Pet. App. A21). Finally, the court of appeals ruled that petitioner was not entitled to back pay for the period from August 28, 1966 to June 26, 1967, since the transfer to Dayton was valid and petitioner had refused to report for duty (Pet. App. A22).

1. The court of appeals acknowledged that a transfer of a government employee simply as a pretext to suppress his First Amendment rights would be reviewable adverse action (Pet. App. A19), but held that the facts of record in this case did not warrant the conclusion that the transfer was motivated by a desire to infringe First Amendment rights, as opposed to a legitimate desire to alleviate difficulties with petitioner's compatability and supervision in the Cleveland district office (Pet. App. A20). Thus contrary to petitioner's contention (Pet. 9-11), this decision presents no conflict among the courts of appeals with respect to whether a transfer on account of protected speech would be reviewable.

2. There is, as petitioner contends (Pet. 12-15), a disagreement among the courts of appeals concerning whether, in a suit brought to review an adverse personnel action, the reviewing court inquires only into whether the action was in compliance with applicable statutes and regulations and was not arbitrary, capricious, or unreasonable, or, additionally, into whether it was supported by substantial evidence. Compare, *e.g., Charlton* v.

United States, 412 F.2d 390 (C.A. 3), with, *e.g., Pauley* v. *United States,* 419 F.2d 1061 (C.A. 7). In this case the court of appeals followed *Pauley* in refusing to review the substantiality of the evidence. But this is not an appropriate vehicle for resolution of that long-standing conflict. Review of petitioner's discharge under either standard would produce the same result. There is no factual dispute concerning petitioner's failure to accept reassignment; nor is there any question concerning the agency's authority to discharge an employee who refuses reassignment (Pet. App. A18). Thus petitioner's discharge was proper so long as the reassignment itself was proper. The court of appeals reviewed the record and concluded that the reason given for the transfer—petitioner's inability to get along with his supervisors—was not a pretext to disguise an improper reason. Moreover, such "strained personal relationships * * * provide a permissible basis for a transfer." *Kletschka* v. *Driver,* 411 F.2d 436, 443 (C.A. 2). Accordingly, an inquiry into the substantiality of the evidence would look solely to the question whether there were such strained relations. On that score, the record is clear: there is ample evidence of petitioner's inability to get along with his supervisors and of his disruptive attitude and behavior (see R. 31, 66-68, 96-112, 136-155), and indeed petitioner makes no claim to the contrary. Since petitioner would not have been aided by the expanded scope of review for which he argues, the conflict he asserts is of merely abstract interest in this case and therefore is not an appropriate basis for granting review.

3. Petitioner's contention to the contrary notwithstanding, he was not denied "procedural or substantive safeguards" (Pet. 15-17). His claim appears to be that it was improper to place him on "absent without leave" status during the 30 days following the original notice

of proposed discharge; he asserts that employees "ordinarily will remain on the payroll for at least 30 days after notice" (Pet. 15). But this, of course, is because the employee normally continues to perform his work responsibilities. Petitioner had refused to perform his, so that the "absent without leave" status was merited. An employee is not entitled to be carried in a pay status when he voluntarily absents himself from assigned duty.

4. Petitioner erroneously contends (Pet. 17-18) that his complaint presented an issue of fact that could not be resolved on motion for summary judgment. The grant of summary judgment correctly embodied a determination that any factual dispute over the reason for petitioner's transfer could be resolved on the basis of the administrative record. "[*D*]*e novo* review is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding * * * ." *Camp* v. *Pitts,* 411 U.S. 138, 142. That is not the case here: the proceedings before the Civil Service Commission adequately and fully inquired into the reason for petitioner's transfer (see pp. 3-4, *supra*), and both the Commission's findings and the evidence therefor are set forth in the administrative record. In these circumstances, summary judgment on the basis of that record was appropriate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent admits (Opposing Memo, p. 5) conflict between circuits concerning the "substantial evidence" rule. Although respondent refers (Opposing Memo, pp. 5-6) only to *Charlton v. United States*, 412 F.2d 390 (3rd Cir.) and *Pauley v. United States*, 419 F.2d 1061 (7th Cir.), the ultimate result (Pet. 12-15) is that the Sixth and Seventh Cir-

cuits do not apply the "substantial evidence" rule recognized and followed in the District of Columbia, Fourth and Fifth Circuits. This conflict between circuits, now conceded, alone is sufficient cause for a grant of certiorari.

As applied to an employee discharge, respondent misconstrues and misstates the application of the "substantial evidence" rule in *Camp v. Pitts,* 411 U.S. 138 (1972). That case holds in a National Bank case that the District Court is not to hold a "de novo" hearing in which to apply the test. By dicta, this Supreme Court also states that the "substantial evidence" test is to apply in an employee discharge case, when at page 141 it states:

> "* * * Accordingly, the proper standard for judicial review of the Comptroller's adjudications is not the 'substantial evidence' test which is appropriate when reviewing findings made on a hearing record, 5 U. S. C. § 706(2)(E). * * *"

This in substance was the holding in *Charlton v. United States, supra,* in its application of the substantial evidence test. The interpretation of this Supreme Court's prior decisions now becomes added reason for grant of certiorari.

Respondent also endeavors to avoid certiorari by contending that the facts in the case justify the result. Respondent's contention (Opposing Memo, p. 6) that petitioner makes no claim contrary to its statement of fact is misleading and just is not true. Petitioner claims (Pet., p. 8) that the evidence in the administrative record supports his factual statement. Respondent's contentions are to the contrary. However, whatever the contentions, the respondent's Memorandum makes it quite clear that the transfer was "adverse action" within the rationale of *Motto v. General Services Administration,* 335 F. Supp. 694

(E.D. La., 1971), *affirmed* 502 F.2d 1165 (5th Cir., 1974), *cert. denied* 420 U.S. 927, and thereby establishes conflict on the transfer aspect of the case (Pet., pp. 9-11). Whether the "pretext" was both to circumvent the Veterans Preference Act and infringe upon protected First Amendment rights, of course, can be determined only by a "substantial evidence" review of the administrative record. Respondent concedes (Opposing Memo, p. 6) that this was not done. Under such circumstances, the conflict between circuits as to the "pretext" and the "adverse action" of the transfer becomes additional reason for grant of certiorari, particularly in a case decided on a motion for summary judgment wherein the facts are not supposed to be subject to dispute.

Petitioner respectfully submits that respondent's Memorandum in Opposition presents no valid objection to a grant of certiorari. Petitioner therefore again submits that a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Counsel for Petitioner